Supreme Court, U.S.
FILED
APR 2 1996
CLERK

1770
No.

In The Supreme Court of The United States

OCTOBER TERM, 1995

LAFAYETTE MOREHOUSE, INC., et al.,
Appellants.

vs.

THE CHRONICLE PUBLISHING COMPANY, et al.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF CALIFORNIA, FIRST APPELLATE DISTRICT, DIVISION FIVE

BRIEF FOR RESPONDENTS IN OPPOSITION

JAMES M. WAGSTAFFE
MARK L. TUFT
COOPER, WHITE & COOPER

201 California Street, Seventeenth Floor
San Francisco, California 94111
Telephone: (415) 433-1900
Attorneys for Respondents
The Chronicle Publishing Company, Dan Reed, April Lynch and Alice Kahn

12 pp

QUESTIONS PRESENTED

Respondents do not challenge the questions presented by petitioners. However, petitioners raise no important questions of federal law nor do they implicate any federal question in conflict with the decision of any state or federal court.

TABLE OF CONTENTS

OPINIONS BELOW 1
JURISDICTION 2
STATEMENT OF THE CASE 2
ARGUMENT 4
A. More's Constitutional Attacks Are Infirm And Do Not Warrant Review By This Court 4
B. More Seeks Review of a Public Figure Analysis Not Contained in the Court of Appeal's Opinion . . 6
CONCLUSION 7

TABLE OF AUTHORITIES

Cases:

American Bank & Trust Co. v. Community Hospital
(1984) 37 Cal.3d 174 5
Denney v. Lawrence
(1994) 22 Cal.App.4th 927 6
Hung v. Wang
(1992) 8 Cal.App.4th 908 5
Kremer v. Chemical Const. Corp.
(1982) 456 U.S. 461 6
Midway Motor Lodge v. Innkeepers' Telemgmt. & Equip.
(7th Cir. 1995) 54 F.3d 406 6

Mountain Water Co. v. Montana Dept. of Pub. Serv. Reg. (9th Cir. 1990) 919 F.2d 593 5
Nadel v. Regents of University of California (1994) 28 Cal.App.4th 1251 7
Robertson v. Rodriguez (1995) 36 Cal.App.4th 347 5
Rudnick v. McMillan (1994) 25 Cal.App.4th 183 7
Wardius v. Oregon (1973) 412 U.S. 470 6

Statutes:

Cal. C.C.P. § 425.16 3-5

In The Supreme Court of The United States

OCTOBER TERM, 1995

LAFAYETTE MOREHOUSE, INC., et al.,
Appellants

vs.

THE CHRONICLE PUBLISHING COMPANY, et al.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF CALIFORNIA, FIRST APPELLATE DISTRICT, DIVISION FIVE

BRIEF FOR RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the California Court of Appeal (Pet. App. 1-26) is reported at 37 Cal.App.4th 855. The Order of the California Supreme Court denying petitioners' petition for review (Pet. App. 27) is unreported.

JURISDICTION

Respondents do not disagree with petitioners' jurisdictional statement.

STATEMENT OF THE CASE

This action involves review of the dismissal of a meritless libel suit brought by Lafayette Morehouse, Inc., dba More University ("More"), et al. against The Chronicle Publishing Company ("Chronicle"), et al. based on news reports that accurately reported More's involvement in a highly controversial zoning dispute. As found by the California trial and appellate courts, Chronicle also accurately reported that More was a "sensuality school" since this "university" offered graphic courses in sexuality and even a Ph.D. in "Sensuality."

Although More's libel complaint challenged Chronicle's description of the college as a "sensuality school," the facts indisputably demonstrated the accuracy of this statement. More University offered classes in "Fundamentals of Sensuality," "Basic Sensuality," "Basic Hexing," "Man/Woman," "Aphrodisia," "Advanced Sensuality Laboratory," and even one called "Mutual Pleasurable Stimulation of the Human Nervous System." [*See* Pet. App. 3-5] Through course studies and with laboratory work, students are able to earn a degree and eventually a Ph.D. in "sensuality." [*Id.*]

In early 1992, More permitted a large number of homeless persons to live in tents on its property that was located in a residential neighborhood in Lafayette, California. Predictably, More's neighbors lodged formal complaints with Contra Costa

County concerning problems that resulted in connection with More's unauthorized activities. Contra Costa County's Board of Supervisors responded by holding public hearings and asking its staff to prepare a report. Chronicle accurately reported the contents of these public records, including the complaints of neighbors that the "guests" at Lafayette posed a fire hazard and were panhandling in nearby locations. [*Id.*]

More's representatives held a press conference to announce their refusal to cease the challenged activities. As a result, the County filed a state court lawsuit to enjoin the alleged zoning violations. More interjected itself further into this public controversy by filing its own civil rights lawsuit against Contra Costa County in federal court. Chronicle accurately reported the allegations in these lawsuits.

Upon being sued by More for libel, Chronicle moved to strike the lawsuit under Cal. C.C.P. § 425.16, California's anti-SLAPP statute. The trial court granted the motion because More presented no evidence showing that the articles were false or that Chronicle published the news articles in question with actual malice; in contrast, Chronicle submitted substantial evidence, declarations and public records demonstrating the truth of the matters challenged in the articles.

The California Court of Appeal affirmed the trial court's order granting the motion to strike on two separate grounds. First, the Court ruled that More did not present a statement of facts in its brief and, therefore, it had failed to meet its burden of showing error. [Pet. App. 21-22] Second, the Court of Appeal ruled that More had failed to make a factual showing in the trial court supporting its libel claims. [Pet. App. 23-24]

What More has ignored at each judicial level is that the articles in question were true. Chronicle accurately reported information contained in public records concerning the Contra Costa County zoning dispute and demonstrated through More's course catalogue that it had a "sensuality" curriculum. [Pet. App. 23-24]

More also ignored Chronicle's undisputed evidence that its writers believed the articles were truthful and thus lacked actual malice. More presented no evidence on this dispositive point and it never made a request for any discovery, despite the fact that the Court did not hold its hearing on Chronicle's motion for many months. [*Id.*]

ARGUMENT

The decision of the California Court of Appeal is correct with respect to the issues being raised here by petitioners, and does not conflict with any decision of this Court or any other state or federal court. Since there are no important federal questions raised here, further review is not warranted.

A. More's Constitutional Attacks Are Infirm And Do Not Warrant Review By This Court

More makes a scattershot attack on the constitutionality of section 425.16, asserting that this statute is void for vagueness, violative of equal protection and "fundamentally unfair." [Pet. 9-18] However, as the Court of Appeal correctly ruled, these arguments are meritless because More simply misapprehends the scope of the constitutional protection in question.

More first argues that the statute gave it no "fair warning" that it would have to produce information showing a *prima facie* case at the outset. [Pet. 10] This argument is frivolous. This is precisely what the statute says and it is consistent with established interpretations of similar statutes. California's courts have long held that the legislature can enact statutes requiring a party to come forward -- even in early stages of litigation -- with the facts showing there is a genuine issue for trial. *See Hung v. Wang* (1992) 8 Cal.App.4th 908, 927. There is nothing "vague" about such statutory procedures.

More's equal protection argument is also misguided. As the Court of Appeal held, the protections included in section 425.16 are rationally related to the Legislature's expressed goal of reducing "a disturbing increase in lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for redress of grievances." Cal. C.C.P. § 425.16(a). The Court's rejection of More's argument is consistent with existing law and is wholly unremarkable. *See American Bank & Trust Co. v. Community Hospital* (1984) 37 Cal.3d 174, 181-82 (statute offering protection in malpractice suits not violative of equal protection); *Mountain Water Co. v. Montana Dept. of Pub. Serv. Reg.* (9th Cir. 1990) 919 F.2d 593, 597 (statute distinguishing between privately and publicly owned utilities constitutional).

Finally, the Court of Appeal also correctly ruled that there was nothing "fundamentally unfair" about the statute's discovery limitations as applied to the circumstances of this case. [Pet. App. 19-21] Quite simply, More never exercised its statutory right to request leave to take discovery -- despite many months in which to do so. This failure waived any challenge. *See Robertson v.*

Rodriguez (1995) 36 Cal.App.4th 347, 357 (failure to seek discovery under statute waives challenge to its unavailability).

More's argument also fails because there is no due process right to discovery in the first instance. This Court repeatedly has emphasized that "no single model of procedural fairness, let alone a particular form of procedure, is dictated by the Due Process Clause." *Kremer v. Chemical Const. Corp.* (1982) 456 U.S. 461, 483. Considering that pretrial discovery to gather evidence was largely unknown at the time the fifth and fourteenth amendments were adopted, it would be anomalous if discovery were the exception to the general rule that the constitution permits flexibility in procedure, so long as fundamental fairness is maintained. *See Midway Motor Lodge v. Innkeepers' Telemgmt. & Equip.* (7th Cir. 1995) 54 F.3d 406, 408; *Wardius v. Oregon* (1973) 412 U.S. 470, 474 (no constitutional right to unlimited pretrial discovery in criminal cases).

B. More Seeks Review of a Public Figure Analysis Not Contained in the Court of Appeal's Opinion

More would have this Court review an issue as to the public figure doctrine not discussed in the Court of Appeal's Opinion. This Court should not review an appellate decision on an issue that was not even included in the Opinion under consideration.

Even if the Court had specifically addressed this topic, there is no doubt that More and its affiliated co-plaintiffs are public figures as determined correctly by the trial court. *Denney v. Lawrence* (1994) 22 Cal.App.4th 927, 934 (plaintiff who gave press interviews and promoted his version of controversy is public

figure); *Rudnick v. McMillan* (1994) 25 Cal.App.4th 183, 1190 (rancher who facilitated press coverage is public figure); *Nadel v. Regents of University of California* (1994) 28 Cal.App.4th 1251, 1269-70 (plaintiffs who spoke publicly at city council meeting, at political events and in a press conference are public figures).

More satisfies this established test. Along with its personnel and related corporate entities, More became the subject of enormous publicity arising from disputes with owners of neighboring properties. They conducted a press conference, issued a press release and attempted to control the resolution of this controversy. Moreover, More responded to the zoning controversy and to its students' charges by filing several high profile state and federal lawsuits. They were limited public figures and review is unnecessary to address this long settled area of law.

CONCLUSION

There is no basis for this Court to review this well-reasoned appellate decision. Petitioners have shown no conflict among the lower courts nor have they shown any compelling reason to review the legal issues correctly decided below. Since this lawsuit was frivolous at its outset and remains so, Chronicle

respectfully requests that this Court end this litigation and deny More's Petition.

DATED: April 1, 1996

COOPER, WHITE & COOPER
JAMES M. WAGSTAFFE
MARK L. TUFT

JAMES M. WAGSTAFFE
Attorneys for Respondents

PROOF OF SERVICE

I am a member of the Bar of the Supreme Court, and a resident of the State of California, over the age of eighteen years, and not a party to the within action. My business address is Cooper, White & Cooper, 201 California Street, Seventeenth Floor, San Francisco, California 94111.

On April 1, 1996, I served the within **BRIEF FOR RESPONDENTS IN OPPOSITION** documents on the parties listed below as follows:

United States Supreme Court — **By Federal Express**
1 First St., N.E.
Washington, D.C. 20543

Court of Appeal — **By First Class Mail**
State of California
First Appellate District, Division Five
303 Second St., South Tower
San Francisco, CA 94107

Richard W. Hyland, Esq. — **By First Class Mail**
3237 Deer Hill Road
Lafayette, CA 94549
(510) 283-7163

Walter P. Maksym (Pro Hac Vice) — **By First Class Mail**
Walter Maksym & Associates
1550 Spring Road, Suite 225
Oak Brook, IL 60521

☐ **By facsimile machine (FAX)** by personally transmitting a true copy thereof via an electronic facsimile machine.

☒ **By first class mail** by placing a true copy thereof in a sealed envelope with postage thereon fully prepaid and placing the envelope in the firm's daily mail processing center for mailing in the United States mail at San Francisco, California.

☐ **By personal service** by personally delivering a true copy thereof to the addresse(s) listed herein at the location listed herein.

☒ **By Federal Express** or overnight mail.

☐ *(State)* I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

___

☐ *(Supreme)* I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

Executed on April 1, 1996, at San Francisco, California.

JAMES M. WAGSTAFFE